

JPMorgan Chase Bank, N.A. v Bowker
2019 NY Slip Op 31369(U)
May 13, 2019
Supreme Court, New York County
Docket Number: 850239/2016
Judge: Arlene P. Bluth
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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ARLENE P. BLUTH PART IAS MOTION 32

Justice

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INDEX NO. 850239/2016

JPMORGAN CHASE BANK, NATIONAL ASSOCIATION,

MOTION DATE N/A

Plaintiff,

MOTION SEQ. NO. 001

- v -

MINA BOWKER, FIROUZ ISLAMIAN, THE BOARD OF MANAGERS OF THE ZACHARY CONDOMINIUM HOMEOWNERS ASSOCIATION, AMERICAN EXPRESS TRAVEL RELATED SERVICES INC., LESTER & ASSOCIATES PC, CAPITAL ONE BANK, AXIS CAPITAL INC, CITY OF NEW YORK ENVIRONMENTAL CONTROL BOARD, CITY OF NEW YORK PARKING VIOLATIONS BUREAU, CITY OF NEW YORK TRANSIT ADJUDICATION BUREAU, JOHN DOE SAID NAME BEING FICTITIOUS IT BEING THE INTENTION OF PLAINTIFF TO DESIGNATE

DECISION AND ORDER

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75

were read on this motion to/for JUDGMENT - SUMMARY

The motion for inter alia summary judgment against defendant Bowker is granted.

Background

In this foreclosure action, plaintiff seeks to foreclose a consolidated note and mortgage ("CEMA") dated June 5, 2006 executed by Bowker against the premises (125 East 12th Street, Unit 4C, New York, NY 10003). After a series of other transactions, the loan was eventually assigned to plaintiff on March 28, 2013. In December 29, 2015, Bowker executed a loan modification agreement but Bowker subsequently defaulted.

Discussion

"A plaintiff may establish standing in a foreclosure action either by showing assignment of the mortgage note or physical delivery of the note prior to the commencement of the

foreclosure action. However, a plaintiff may not do so by means of conclusory boiler plate statements. Nevertheless, if the note is affixed to the summons and complaint at the time the action is commenced, it is unnecessary to give factual details of the delivery to establish that possession was obtained prior to a particular date” (*Bank of New York Mellon v Knowles*, 151 AD3d 596, 596-97, 57 NYS3d 473 [1st Dept 2017] [internal quotations and citations omitted]). “[I]t is the note, and not the mortgage, that is the dispositive instrument that conveys standing to foreclose” (*Wells Fargo Bank, N.A. v Lawson Ho-Shing*, 168 AD3d 126, 131, 92 NYS3d 194 [1st Dept 2019]).

Plaintiff claims that Bowker failed to make the payment due on July 28, 2016 or any of the payments due thereafter. Plaintiff moves for summary judgment against Bowker and default judgment against the non-answering defendants. In opposition, Bowker claims that plaintiff has failed to establish standing and points to a 2001 note (which was later consolidated in the 2006 CEMA). Apparently, this note was lost (*see* NYSCEF Doc. No. 50).

However, plaintiff’s possession of the 2001 note is irrelevant to whether plaintiff has standing to bring this action because plaintiff does not seek to foreclose on the 2001 note. Instead, plaintiff seeks to foreclose on the 2006 note. And plaintiff attaches the 2006 note to the complaint—that confers standing.

Plaintiff also moves to serve defendant Islamian, a signatory on one of the many mortgages in this litigation, by publication or to deem its attempted service of him by mail in Iran as effective. Plaintiff admits its mailing to Islamian was returned. The Court observes that the answer filed on February 2, 2017 was on behalf of *both* Bowker and *Islamian* (NYSCEF Doc. No. 20). This answer did not raise the purported improper service on Islamian nor was a motion made on service within 60 days of the answer.

On May 18, 2017, the parties entered into a stipulation allowing Bowker to file an amended answer to withdraw Islamian from the answer (NYSCEF Doc. No. 29). That answer was filed on May 29, 2017 (NYSCEF Doc. No. 30). However, that stipulation does not impose a requirement on plaintiff to effectuate service on Islamian because it was entered into more than 60 days after the answer was filed on behalf of both Islamian and Bowker. The fact is that Islamian was represented by counsel during the two months and no motion was made about improper service. The Court finds that Islamian appeared and waived his service defense; therefore, plaintiff need not serve by publication.¹

Accordingly, it is hereby

ORDERED that plaintiff's motion is granted and defendant Bowker's answer with counterclaims is severed and dismissed; and it is further

ORDERED that plaintiff is awarded a default judgment as to the remaining defendants, including Islamian, whose answer was withdrawn when he was removed in the amended answer; and it is further

ORDERED that Thomas Kleinberger, 411 5th Avenue, New York, New York, 10016 (917) 326-5523 is hereby appointed Referee in accordance with RPAPL § 1321 to compute the amount due to Plaintiff for principal, interest and other disbursements advanced as provided for in the note and mortgage upon which this action is brought, and to examine whether the mortgaged property can be sold in parcels; and it is further

ORDERED that the Referee may take testimony pursuant to RPAPL § 1321; and it is further

¹ The Court observes that counsel for defendants cannot withdraw as the attorney for Islamian months after appearing for him simply by filing an amended answer dropping him. Without a discharge or consent to change attorney, a motion (brought by order to show cause) to withdraw as counsel must be made. As nothing was mentioned, the court assumes that Islamian discharged his attorneys.

ORDERED that by accepting this appointment the Referee certifies that she/he is in compliance with Part 36 of the Rules of the Chief Judge (22 NYCRR Part 36), including, but not limited to §36.2 (c) (“Disqualifications from appointment”), and §36.2 (d) (“Limitations on appointments based upon compensation”), and, if the Referee is disqualified from receiving an appointment pursuant to the provisions of that Rule, the Referee shall immediately notify the Appointing Judge; and it is further

ORDERED that, pursuant to CPLR 8003(a), and in the discretion of the court, a fee of \$350 shall be paid to the Referee for the computation of the amount due and upon the filing of her/his report and the Referee shall not request or accept additional compensation for the computation unless it has been fixed by the court in accordance with CPLR 8003(b); and it is further;

ORDERED that the Referee is prohibited from accepting or retaining any funds for herself/himself or paying funds to him/herself without compliance with Part 36 of the Rules of the Chief Administrative Judge; and it is further

ORDERED that plaintiff shall forward all necessary documents to the Referee within 30 days of the date of this order and shall *promptly* respond to every inquiry made by the referee (promptly means within two business days); and it is further

ORDERED that plaintiff must bring a motion for a judgment of foreclosure and sale within 30 days of receipt of the referee’s report; and it is further

ORDERED that if plaintiff fails to meet these deadlines, then the Court may *sua sponte* vacate this order and direct plaintiff to move again for an order of reference and the Court may *sua sponte* toll interest depending on whether the delays are due to plaintiff’s failure to move this litigation forward; and it further

ORDERED that the caption be amended to remove John Doe as a defendant and the caption shall read as follows;

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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JP MORGAN CHASE BANK, NATIONAL
ASSOCIATION,

Plaintiff,

v.

MINA BOWKER, FIROUZ ISLAMIAN, THE BOARD OF
MANAGERS OF THE ZACHARY CONDOMINIUM
HOMEOWNERS ASSOCIATION, AMERICAN EXPRESS
TRAVEL RELATED SERVICES INC., LESTER &
ASSOCIATES PC, CAPITAL ONE BANK, AXIS CAPITAL
INC, CITY OF NEW YORK ENVIRONMENTAL
CONTROL BOARD, CITY OF NEW YORK PARKING
VIOLATIONS BUREAU, CITY OF NEW YORK TRANSIT
ADJUDICATION BUREAU,

Defendant(s).
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and it is further

ORDERED that counsel for plaintiff shall serve a copy of this order with notice of entry upon the County Clerk (60 Centre Street, Room 141B) and the General Clerk's Office (60 Centre Street, Room 119), who are directed to mark the court's records to reflect the parties being removed; and it is further

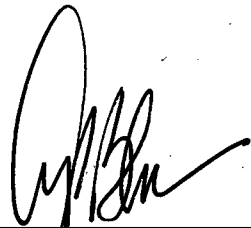
ORDERED that such service upon the County Clerk and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address (www.nycourts.gov/suptctmanh)).

ORDERED that Plaintiff shall serve a copy of this Order with notice of entry on all parties and persons entitled to notice, including the Referee appointed herein.

Next Conference: September 17, 2019 at 2:15 p.m. If plaintiff has moved for a judgment of foreclosure and sale before the conference, then plaintiff can seek an adjournment. Please consult the part's rules for information about how to obtain an adjournment. An appearance is required if a motion for a JFS has not been made; counsel appearing for plaintiff must come prepared to explain the delay or interest may be tolled.

5/13/19

DATE



ARLENE P. BLUTH, J.S.C.

HON. ARLENE P. BLUTH

CHECK ONE:

CASE DISPOSED
 GRANTED DENIED

NON-FINAL DISPOSITION

APPLICATION:

SETTLE ORDER

GRANTED IN PART

OTHER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

SUBMIT ORDER

FIDUCIARY APPOINTMENT

REFERENCE